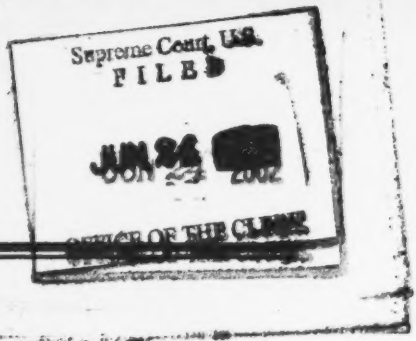

No. 01-1842

IN THE

Supreme Court of the United States

AMERICAN RELIABLE INSURANCE COMPANY, AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, and CAMPBELL INSURANCE SERVICES, INC.,

Petitioners,

v.

ROBERT STILLWELL and HELEN STILLWELL

Respondents.

On Petition for Writ Of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE PETITION NEGLECTS TO INFORM THIS COURT THAT PETITIONERS ARE ALSO PROSECUTING A FEDERAL DIVERSITY ACTION AGAINST RESPONDENTS TO APPEAL THE STATE COURT'S ARBITRATION ORDER AND THAT THE FEDERAL DISTRICT COURT HAS DETERMINED THAT THE INSURER WAIVED ARBITRATION 2

II. PETITIONERS HAVE MISREPRESENTED THE SUBSTANCE OF THE STATE SUPREME COURT'S ORDERS FROM WHICH THEY SEEK RELIEF 3

III. THE PARTIES' DISPUTE IS NOT SUBJECT TO ARBITRATION BECAUSE, AMONG OTHER THINGS, THE ARBITRATION PROVISION IS SILENT AS TO CLASS CLAIMS 5

IV. WEST VIRGINIA LAW IS CONSISTENT WITH FEDERAL LAW IN RESPECT TO ARBITRATION 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

American Reliable Ins. Co., et al., v. Stillwell,
W. Va. Sup. Ct. No. 012231. 5

American Reliable Ins. Co., et al., v. Stillwell
N. Dist. W. Va. Civil Action No. 5:01CV59 . . . . 1, 2

C.P. Robinson Const. Co., v. National Corp for Hous. Part.,
375 F. Supp. at 446, 451. 7

Champ v. Siegel Trading Co., Inc.,
55 F.3d 269 (7th Cir. 1995) 1, 6

Connecticut Nat'l Bank,
826 F. Supp. at 60-62 7

Davister Corp. v. United Republic Life Insurance Co.,
152 F. 3d 1277, fn 1 (10th Cir. 1998) 6

Friedman's Inc. v. Dunlap,
No. 01-1407 (4th Cir. 2002) 4

K.M.C. Co. v. Irving Trust Co.,
757 F.2d 752, 755-56 (6th Cir. 1985) 7

Leasing Serv. Corp.,
804 F.2d at 833 (4th Cir. 1986) 7

National Equipment Rental Ltd. v. Hendrix,
565 F.2d 255, 258 (2d Cir. 1977) 7

TABLE OF AUTHORITIES - CONTINUED

Powertel v. Bexley,
743 So. 2d 570 (Fla. App. 1 Dist. 1999), rehearing denied, May, 2000 6

State of West Virginia, ex rel. James Dunlap v. Berger et al.,
No. 30035 (June 13, 2002). 4

Constitution, Statutes and Regulations:

9 U.S.C § 1, *et seq.* 6

15 U.S.C. § 1011 *et seq.* 6

U.S. Const., Amdt. 7 ..... 1, 7

U.S. Sup. Ct. R. 14(i)(ii) 2

SUMMARY OF THE ARGUMENT

I. Petitioners have failed to disclose to this Court a diversity suit in which they presently seek federal relief from the state court's arbitration order. The federal suit is captioned *American Reliable Insurance Company, American Bankers Insurance Company of Florida and Campbell Insurance Services, Inc., v. Robert Stillwell and Helen Stillwell*, Northern District of West Virginia Civil Action No. 5:01CV59. Among other things, the district court denied Petitioners' motion to compel arbitration and has ruled that the insurer waived arbitration in the matter now before this Court. See Appendix A, page 10a.

II. Petitioners have misrepresented the substance of the state rulings of which they complain. Petitioners were never denied an appeal. Moreover Petitioners have misrepresented on page 1 of their Petition, that the West Virginia Supreme Court of Appeals has "held that West Virginia is not required to provide an immediate interlocutory appeal of an order denying a motion to compel arbitration and stay judicial proceedings under the FAA." The state supreme court held no such thing. See orders of the West Virginia Supreme Court of Appeals, Petitioners' Appendix C, D and E.

III. Respondents' claims are not subject to arbitration. The arbitration provision was obviously not intended to govern class claims. It is completely silent as to class claims and therefore cannot be as broad as Petitioners contend. See *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995).

IV. West Virginia's "bargained for" doctrine, the main target of Petitioners' anathema with respect to West Virginia's body of arbitration law, does not conflict with federal law and is consistent with the federal requirement that an arbitration agreement must be bargained for to pass muster under the Seventh Amendment to the United States Constitution.

ARGUMENT

I. THE PETITION NEGLECTS TO INFORM THIS COURT THAT PETITIONERS ARE ALSO PROSECUTING A FEDERAL DIVERSITY ACTION AGAINST RESPONDENTS TO APPEAL THE STATE COURT'S ARBITRATION ORDER AND THAT THE FEDERAL DISTRICT COURT HAS DETERMINED THAT THE INSURER WAIVED ARBITRATION

Petitioners should have told this Court that their request for arbitration was denied not only by the state court but also by a federal district court in *American Reliable Insurance Company, American Bankers Insurance Company of Florida and Campbell Insurance Services, Inc., v. Robert Stillwell and Helen Stillwell*, Northern District of West Virginia Civil Action No. 5:01CV59.

Rule 14(i)(ii) of the Rules of the Supreme Court of the United States provides, in part, that the Petition shall contain "...any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies..."

On June 11, 2001, the Circuit Court of Ohio County, West Virginia, entered the arbitration order of which Petitioners complain. On the heels of the state court's order denying arbitration, Petitioners served a federal summons attacking the state court's ruling. The district court, on March 18, 2002, found Petitioners' federal suit to be the "functional equivalent of an appeal from the June 11, 2001, state court decision" and ordered Petitioners' suit dismissed. See Appendix A, pages 9a -10a. Petitioners are now appealing the district court's decision. The district court also determined that

the insurer waived arbitration. Appendix A, page 10a. Petitioners' deliberate omission would seem to transgress the spirit if not the letter of the Rules of the Supreme Court of the United States.

II. PETITIONERS HAVE MISREPRESENTED THE SUBSTANCE OF THE STATE SUPREME COURT'S ORDERS FROM WHICH THEY SEEK RELIEF

Petitioners seek relief in this Court from an order of the West Virginia Supreme Court of Appeals entered on March 13, 2002. See Petitioners' Appendix E. Petitioners characterize the state supreme court's order as the denial of a right of appeal but the order says otherwise. After reciting the history of proceedings, the West Virginia Supreme Court states as follows:

> "Upon consideration whereof, the Court is of the opinion that an appeal of the merits of this matter continues to be premature. Specifically, it appears that issues of fact and of state law have not been finally determined below, which issues may determine the questions of when and to what extent the Federal Arbitration Act applies to the contracts involved in this case."

Petition, Appendix E, page 14a. (Emphasis added.)

Far from denying an appeal and ignoring federal law, the state supreme court's order *invites* an appeal and expresses West Virginia's intention to consider federal law if and when the record below is sufficiently mature to allow a reasoned determination. Petitioners seem to forget that state law

determines the validity, revocability and enforceability of the arbitration agreement, as the federal district judge properly noted in disposing of Petitioners' federal appeal. See Appendix A, page 16a. [1]

Petitioners have also misrepresented to this Court that the West Virginia Supreme Court of Appeals "held" in this case that "West Virginia is not required to provide an immediate interlocutory appeal of an order denying a motion to compel arbitration and stay judicial proceedings under the FAA." See Petition, page 1. West Virginia "held" no such thing in this matter. See Petitioners' Appendix C, D and E.

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[1] Coincidentally, on June 13, 2002, the West Virginia Supreme Court of Appeals filed a decision in another case involving American Bankers Insurance Company of Florida, *State of West Virginia, ex rel. James Dunlap v. Berger, et al.*, No. 30035. The full text of this case may be viewed at http://www.state.wv.us/wvsca/docs/spring02/30035.htm. In *Dunlap*, which is relevant in that it also involves an arbitration clause contained in a contract of adhesion, the state supreme court refused to enforce an arbitration agreement, concluding, *inter alia*, that the arbitration provision would unconscionably deny the right to pursue class claims. The state supreme court carefully balanced concerns of state and federal law and voiced a profound respect for arbitration, stating, that the party drafting the agreement, "...sought to unilaterally use (one could say "misuse") the honorable mechanism of arbitration -- that has found a respected place in the commercial life of our nation -- as a scheme or mechanism to shield itself from legal accountability for misconduct." *Dunlap*, page 17 of 25. In the present case also, Petitioners are simply trying to shield themselves from accountability -- particularly class action accountability. Interestingly, American Bankers, represented in *Dunlap* by the same law firm as in the present case (Jordan-Burt) filed a collateral federal suit to hedge its bets, as was also done in the present case. The Fourth Circuit Court of Appeals chastised the federal plaintiffs in *Dunlap*, including American Bankers, for the very same jurisdictional improprieties Petitioners exercised in their improper, collateral federal appeal in the present case. *See Friedman's Inc. v. Dunlap*, 01-1407 (4th Cir. 2002).

Further belying Petitioners' claims that West Virginia fails to grant appellate review, on June 17, 2002, Petitioners filed an "Emergency Motion to Extend Stay of Circuit Court Proceedings Pending Resolution of Petition for Writ of Certiorari to the United States Supreme Court." In their motion, expressly contradicting their representation to this Court, Petitioners acknowledge that the West Virginia Supreme Court of Appeals grants appellate review appropriately in arbitration cases. Petitioners say in their state supreme court motion:

> "Indeed, like the U.S. Supreme Court, this Court has noted in the context of appellate review of arbitration orders that 'to compel [Petitioners] to proceed through the trial process and then appeal to this Court would be inefficient, and a **waste of the time and resources** of the circuit court and of this Court.'" (Emphasis in Petitioners' motion).

Appendix B, page 21a, excerpt from Petitioners' June 17, 2002, motion to the state supreme court in *American Reliable Ins. Co., et al., v. Stillwell*, No, 012231.

III. THE PARTIES' DISPUTE IS NOT SUBJECT TO ARBITRATION BECAUSE, AMONG OTHER THINGS, THE ARBITRATION PROVISION IS SILENT AS TO CLASS CLAIMS

The arbitration clause found in the insurance policy was obviously not for the purpose of arbitrating class claims. The arbitration provision does not even speak to class claims. Petitioners insist, though, that the arbitration clause is so broad as to encompass every conceivable claim -- even Respondents' class claims. Absent a provision for class treatment of

disputes, however, a court has no authority to certify class arbitration. *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995). Accordingly, the arbitration clause cannot be as broad as Petitioners say it is. If the arbitration clause were as broad as Petitioners contend, it is invalidated on those grounds for effectively removing the policyholders' ability to pursue a remedy on behalf of a class of policyholders similarly situated.

An arbitration provision that would allow an insurer to thwart a class action benefits only the insurer, making the provision so totally one-sided in that respect as to render it unenforceable.

A Florida appellate court reached the same conclusion in *Powertel v. Bexley,* 743 So. 2d 570 (Fla. App. 1 Dist. 1999), rehearing denied, May, 2000. In *Powertel*, the Florida court examined an arbitration agreement in a consumer contract for telephone service. As in the present case, the arbitration clause invoked the Federal Arbitration Act, 9 U.S.C § 1, *et seq.* ("FAA"). Citing *Champ,* the state court reasoned that the arbitration provision was unenforceable because appellees, consumers pursuing a class action for statutory violations, if compelled to arbitrate, would be deprived of the ability to pursue a class action. While acknowledging the strong federal policy in favor of arbitration, the Florida court concluded that if arbitration were to deprive a party of remedies otherwise available in a court of law, the arbitration clause was rendered invalid. The same is true in the present case.[2]

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[2] Unlike *Powertel*, the arbitration clause in the case at bar is in an insurance policy. This is noteworthy because the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, reserves regulation of the business of insurance to the states, calling into question Petitioners' preemption argument. The FAA is not an Act specifically related to the business of insurance, *Davister Corp. v. United Republic Life Insurance Co.*, 152 F. 3d 1277, fn 1 (10th Cir. 1998),

IV. WEST VIRGINIA LAW IS CONSISTENT WITH FEDERAL LAW IN RESPECT TO ARBITRATION

Petitioners say West Virginia's "bargained for" doctrine conflicts with federal law, but federal law mandates the same result as West Virginia's "bargained for" doctrine. Under federal law, an application to compel arbitration must be denied, leaving the opposing party with unrestricted access to a jury trial unless the party seeking arbitration can establish the right to arbitration, including the making of the agreement. *See C.P. Robinson Const. Co., v. National Corp for Hous. Part.*, 375 F. Supp. at 446, 451.

The seventh amendment right to a jury trial is fundamental. It may be waived by contract, but an effective waiver must be knowing and intentional. *See K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755-56 (6th Cir. 1985); *National Equipment Rental Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977). *See also, Leasing Serv. Corp.*, 804 F.2d at 833 (4th Cir. 1986) (waiver upheld because parties were not manifestly unequal in bargaining power and both had sophistication in business, participated in extensive negotiations and the party seeking to avoid the waiver had carefully reviewed the entire contract). *See also, Connecticut Nat'l Bank*, 826 F. Supp. at 60-62 (court considered sophistication of parties, representation by counsel and equality of bargaining power).

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and does not gain automatic federal priority as Petitioners claim.

CONCLUSION

Given the lack of merit to any of Petitioners' claims, the Petition for Writ of Certiorari should be denied.

Aside from the absence of any genuine issue that would justify the United States Supreme Court's intervention in this matter, Petitioners' concealment of their federal appeal in the Northern District of West Virginia is adequate cause to refuse. This Court should also not tolerate misrepresentations by Petitioners as to the holdings of the state supreme court.

Respectfully submitted,

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